FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-244

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN M. SALVUCCI, JR. AND JOSEPH G. ZACKULAR

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT JOSEPH G. ZACKULAR

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I.

THE FOURTH AMENDMENT RIGHTS OF THE RESPONDENTS WERE CLEARLY VIOLATED AND THE JUDGE WAS CORRECT IN RULING THAT THEY POSSESSED STANDING TO ASSERT A VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

Despite apparent assertions by the government in its brief it is still true that the Fourth Amendment protects people - and not simply areas - against unreasonable searches and

seizures. *Katz v. United States,* 389 U.S. 347 (1967); *Warden v. Hayden,* 387 U.S. 294 (1967); *United States v. Miller,* 425 U.S. 435 (1976). Although the respondent recognizes he possessed no actual standing to contest the lawfulness of the search and seizures in the instant case, the automatic standing rule, originally promulgated by the Court in *Jones v. United States,* 362 U.S. 257 (1960) clearly allowed him the right to assert an argument at a hearing on his motion to suppress that the government had abridged his rights. Contrary to what the government asserts in footnote 4 of its brief (Brief of the United States, p. 11) this Court should not just deny the motions to suppress and remand the case for trial if the Court agrees with the novel contentions advanced by the government. Because counsel relied on the basic premises of *Jones v. United States,* supra, that charging a defendant with a crime that necessitates proof of unlawful possession of the evidence in question confers automatic standing, this Court should remand the case for further evidentiary proceedings, if and only if the Court is prepared to overrule a case that lies at the very heart of the exclusionary rule. Dershowitz & Ely, *Harris v. New York: Some Anxious Observations On The Candor and Logic Of The Emergency Nixon Majority,* 80 Yale L.J. 1198, 1209-11 (1971).

The respondent also takes issue with a second assertion made by the government that this Court abandoned the concept of "standing" under the Fourth Amendment in *Rakas v. Illinois,* 439 U.S. 128 (1978). The respondent suggests that this interpretation of *Rakas* is clearly erroneous. The decision of the Court in *Rakas,* was limited to the facts before it. There the petitioners were not charged with a possessory crime and clearly did not have automatic standing to assert a violation of their constitutional rights.

Their status as passengers in a car owned and operated by another lent itself toward an inquiry "of whether this disputed search and seizure has infringed an interest of the Defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois,* supra at p. 140. This case presents an entirely different proposition. Although respondents in the instant case do not have actual standing the nature of charge confers automatic standing.

II.

"AUTOMATIC STANDING" RULE OF JONES V. UNITED STATES SHOULD NOT BE OVERRULED.

The government in the present case is asking the Court to reassess the validity of the "automatic standing" rule enunciated by this Court in *Jones v. United States,* 362 U.S. 257 (1960). This case is not an appropriate vehicle for that reassessment since the respondents were charged with crimes that have as an essential element proof of possession of the evidence seized at the time of the contested search and seizure. What Mr. Justice Frankfurter said in *Jones,* supra, rings true today:

> . . . To hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus

subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. *Jones v. United States,* 362 U.S. 257, 261.

The government's argument that Mr. Zackular is vicariously asserting the Fourth Amendment rights of his mother is completely without merit. *Alderman v. United States,* 394 U.S. 165 (1969). This argument would be true if Mr. Zackular was not charged with a crime that includes possession as an essential element. Indeed, the Court's opinion in *Rakas v. Illinois,* No. 77-5781 (December 5, 1978) supports this contention. Had the defendants in *Rakas* been charged with possessory crimes the respondent suggests the Court might have ruled differently.

The distinguishing feature of this case is the crime with which the defendant is charged. Zackular is charged with unlawful possession of stolen mail, in violation of 18 U.S.C. 1708. The very nature of this indictment provides him with "automatic standing" to assert a violation of his Fourth Amendment rights. *Jones v. United States,* supra. The opinions of the Court in *Brown v. United States,* 411 U.S. 223 (1973), and *Rakas v. Illinois,* supra, are not inapposite.

It is still true that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures. *Katz v. United States,* 389 U.S. 347 (1967); *Warden v. Hayden,* 387 U.S. 294 (1967); *United States v. Miller,* 425 U.S. 435 (1976). Mr. Zackular, in a very real sense, "a person aggrieved by an unlawful search and seizure". See Rule 41 (e) of the Federal Rules of Criminal Procedure. Rule 41 (e) should not be applied to allow the Government to deprive the defendant of standing to bring a motion to suppress by framing the indictment in general terms, while prosecuting for possession. The Court

in *Jones v. United States,* supra, was cognizant of the prosecutorial self-contradiction and ruled accordingly. The doctrine clearly must continue, otherwise every prosecutor would have an advantage in asserting that the defendant did not have possession to justify Fourth Amendment protection, but did have sufficient possession to justify a conviction.

The automatic standing role of Jones should clearly survive this Court's decision in *Simmons v. United States,* 390 U.S. 377 (1968). Simmons only resolved the self-incrimination dilemma faced by defendants who seek to suppress evidence and proffer testimony at a hearing on such a motion. To the extent *Simmons* permits a defendant's testimony on his suppression motion to be used to impeach his testimony at trial, the automatic standing rule should be retained. See 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment §113, at 588-589-589 (1978).

The validity of the automatic standing rule rests also on the asserted "vice of allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes. "*Brown v. United States* 411 U.S. 223 (1973). After Simmons, courts have framed the question surrounding the Jones rule in terms of whether prosecutorial self-contradiction alone justifies maintenance of automatic standing. *Alderman v. United States,* 411 U.S. 223 (1973). This view of *Simmons* effect is myopic-the availability of pre-trial testimony for impeachment purposes still poses Fifth Amendment and prosecutorial self-contradiction problems

similar to those enuciated in Jones[1].

Although such incriminating testimony is admitted only for the jury's consideration of the defendant's credibility, from a practical standpoint, the testimony prejudices the defendant's case. Defendants who seek to exclude unlawfully seized evidence confront a choice: they may forego the exclusionary rule remedy to avoid self-incrimination when the suppression hearing testimony is admitted at trial for impeachment, or they may seek exclusion of unlawful evidence, establish standing, and forego testifying on their own behalf at trial. Moreover, under the guise of impeachment the prosecutor may then use the defendant's

[1]In Jones the Court decried the unfair position of a defendant charged with possession and forced to establish standing. 362 U.S. 257, 261-63 (1960);

The availability of pre-trial testimony for purposes of impeaching a defendant's credibility presents a dilemma for a defendant charged with possession that *Jones, Rakas* and *Simmons* do not assuage. Use of otherwise inadmissible pre-trial testimony for impeachment purposes was limited to situations where a defendant made sweeping denials of compliccity in the crimes charged. *Walder v. United States,* 347 U.S. 62, 65 (1953). Also, the prosecution could use otherwise-excluded evidence to impeach only those statements made by the defendant relating to matters collateral to the crimes charged. See *Harris v. New York,* 401 U.S. 222, 227-28 (Brennan, J., dissenting) (1971) *Walder* permits impeachment with unlawfully seized evidence only as to matters unrelated to indictment charges); *LaFave, supra* note 6, §11.6(a), at 700-11 (explaining Walder rule); 34 *Ohio* St. L.J. 706, 715 (1973) (use of unlawful evidence for impeachment originally depended on whether evidence collateral). In *Harris v. New York,* however, the Supreme Court broadened *Walder* by upholding the admission of statements made in violation of Miranda warnings, although they bore directly on the crimes charged when they were introduced to rebut a simple denial of criminal allegations. 401 U.S. 222, 226 (1971). Dismissing Walder as being no different "in principle," the Court ruled that "having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devises of the adversary process."

testimony to influence the jury's perception of the defendant's guilt.[2] This tactic is the moral equivalent of the prosecutorial advantage proscribed in *Jones.*

Liberal availability of otherwise inadmissible pre-trial testimony for impeachment purposes not only may taint the judicial process but also can undermine the deterrent objective of the exclusionary rule. Such ready circumvention of the exclusionary rule would encourage rather than prevent unlawful police procedures.[3]

Abrogation of the automatic standing rule would have an equally harmful effect. Police could deliberately conduct unlawful searches and seizures, knowing the violation of one person's rights may successfully implicate many unprotected persons.[4]

[2]In *Duncan v. State,* 276 Md. 715, 730, 351 A.2d 144, 152 (1976), the court observed that "(o)n a motion to suppress testimony an alert prosecutor might well elicit from persons in the position of (defendants) small bits of information from which he could well develop the basis for additional investigation calculated to make the State's case stronger. This represents one of the very vices *Jones* was intended to prevent." Thus, if a defendant charged with possession must testify at a suppression hearing, his incriminating, unfairly-elicited statements may later be deliberately introduced, under cover of impeachment, to effectively convict him.

[3]If the exclusionary rule is no obstacle to convicting defendants, police need not fear its sanctions when conducting searches or seizures. Police will have an incentive to violate Fourth Amendment rights where evidence cannot be obtained lawfully, if such evidence can be used in some way to obtain convictions. *See* Dershowitz & Ely, *supra* note 77 at 1219 n. 87 (deterrent effect of rule diminished wherever incentive for misconduct remains).

[4]Those charged with constructive possession or those implicated through violation of another's Fourth Amendment rights, do not have the requisite "legitimate" privacy interest and cannot challenge the unlawful search and seizure. Knowing this, police would only benefit by conducting an illegal search against one person if they expected to thereby implicate other persons. The exclusionary rule would no longer have its primary deterrence foundation.

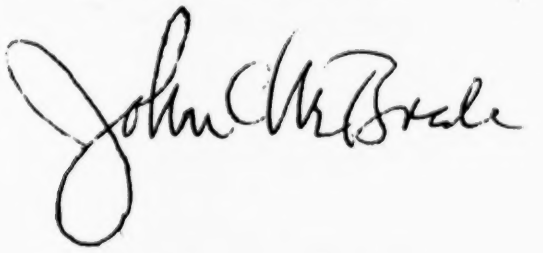
Judicial equity dictates maintenance of the automatic standing rule. The vices nourished by the rule's abrogation—unfair prosecutorial advantage, the self-incrimination dilemma, and police misconduct—outweigh the benefit of convicting or acquitting defendants on all reliable evidence. The Court of Appeals correctly allowed respondent's assertion of his Fourth Amendment rights where he was charged with possession.

The rationale of *Jones v. United States,* supra should control the decision of this Court. *Jones* made sense when it was decided twenty years ago and it makes sense today. The reasoning of the *Jones* Court was lucid and incisive. The reasoning of the government on the other hand is inconsistent with an even-handed administration of justice. This becomes quite clear when one examines the factual dilemma faced by the respondent, Zackular at the hearing on his motion to suppress and later, at a trial on the merits. To satisfy the government in this case Zackular, although charged with a possessory crime would have had to testify before the motion judge that he had a property interest in his mother's home or that the checks, in fact belonged to him. Having already made these admissions Zackular could not possibly have any desire to make the same inculpatory statements before a jury of his peers. Even if he did testify at a trial that the checks did not belong to him the prosecutor would be armed wth an arsenal of statements made at an earlier suppression hearing which would serve as admission of guilt at a trial. Any argument to the contrary is clearly erroneous.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,



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